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DIVISION II

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STATE OF WASHINGTON

NO. 41866-5-II

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COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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EDWARD H. PIETZ, d/b/a EP PROPERTIES,

Respondent,

v.

ROBERT T. FIREBAUGH,

Appellant.

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BRIEF OF RESPONDENT

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## A. INTRODUCTION

Respondent Edward Pietz ("Pietz") prevailed in the trial court which refused to vacate the Confession of Judgment against Appellant Robert Firebaugh ("Firebaugh"). Firebaugh, a CPA, entered into a confession of judgment in the amount of \$1,552,492.71 for embezzlement of funds. Firebaugh subsequently moved to vacate the judgment. This motion was denied by the Court on February 4, 2011.

Firebaugh committed the embezzlement through the use of pre-signed checks, forged endorsements and otherwise unauthorized checks on Pietz' bank accounts. Firebaugh voluntarily entered into a Confession of Judgment pursuant to RCW 4.60.010 shortly before trial.

Firebaugh now claims he did not understand the terms of the agreement. The Confession of Judgment was for the resolution of a civil lawsuit between Pietz and Firebaugh. Firebaugh argues that he did not know that the Confession of Judgment might be used in a criminal proceeding. Firebaugh

knew of this likelihood at the Court hearing and made the choice to enter into the Confession of Judgment in order to avoid trial.

The present appeal to vacate the Confession of Judgment is simply an attempt to avoid the Judgment and prolong the proceedings. This matter was filed on October 12, 2009. Firebaugh moved for a continuance of the trial date twice. He engaged the services of three successive attorneys for his defense. This case was then stayed for two years during Firebaugh's Bankruptcy proceedings.

Firebaugh fails to provide a basis for this Court to overturn the trial court's considered decision under CR 60(b). The trial court was correct in denying the motion to vacate based on mutual mistake under CR 60(b)(1), a void judgment under CR 60(b)(5) and the catchall provisions of CR 60(b)11.



B. RESTATEMENT OF ISSUES PERTAINING TO  
ASSIGNMENTS OF ERROR

Respondent has no objection to Firebaugh's sole  
assignment of error, rephrased and set forth below:

(1) Assignments of Error

1. Did the trial court err when it denied appellant's  
motion to vacate the Confession of Judgment?

(2) Issues Pertaining to Assignments of Error

Respondent acknowledges Firebaugh's sole issue  
pertaining to the Assignments of Error and designates the  
following issues:

1. Did the trial court correctly rule that the  
Confession of Judgment should not be vacated not based upon  
mutual mistake under CR 60(b)(1)? (Assignment of Error 1)

2. Did the trial court correctly rule that the  
Confession of Judgment should not be vacated based on being a  
void judgment under CR 60(b)(5)? (Assignment of Error 1)

3. Did the trial court correctly rule that the Confession of Judgment should not be vacated based on the catchall provisions CR(b)(11)? (Assignment of Error 1)

4. Should Appellant be precluded from advancing arguments on appeal that were not properly before the trial court? (Assignment of Error 1)

C. RESTATEMENT OF THE CASE

(1) Firebaugh Asserts He Did Not Understand.

Firebaugh, a CPA, asserts that he did not understand the terms of the Confession of Judgment, as he states in his Declaration:

That although I acknowledge that I read the Confession of Judgment, I did not understand its contents nor the legal effect on how it would apply to criminal charges. In particular, I had no idea, based upon the Confession of judgment, that I was agreeing I had engaged in wire fraud, a federal offense." I also did not know the elements of the various civil claims that were filed against me, and further had no idea that the Confession of Judgment would be admissible in a criminal case if charges were filed. I was informed that the Confession of Judgment would not be admissible in any further proceedings.

I don't know or understand any of the Rules of Evidence or how they would apply to my case. All that I was advised was that if I'm charged criminally, I could still raise the same defenses against Mr. Pietz and EP Properties that I raised in the civil case.

CP 74-75.

(2) Firebaugh's Consent To Entry of Judgment.

The Confession of Judgment was signed and entered on December 13, 2010 in a Court hearing that was specially set. CP 17. Firebaugh was represented by an experienced trial attorney and received the benefit of a comprehensive Court hearing for the entry of the Confession of Judgment. The Court questioned Firebaugh to ascertain that he was knowingly and willingly entering into the Confession of Judgment, as shown below:

Judge: Mr. Firebaugh, raise your right hand. Do you solemnly swear or affirm the testimony you're about to give is the truth, the whole truth and nothing but the truth?

Robert Firebaugh ("RF"): Yes I do.

Judge: And have you had the opportunity to go over these terms and conditions of the Confession of Judgment?

RF: Yes sir.

Judge: Do you understand their content?

RF: Not fully but yes.

JUDGE: You've read it?

RF: Yes

Judge: You've read it and it's been explained to you by your attorney?

RF: Yes

Judge: Do you have any questions about it?

RF: No.

Judge: Do you agree to be bind – bound by the terms contained in the Confession of Judgment?

RF: Yes.

Judge: Any you agree to the – the –by executing them and submitting this in as the record?

RF: Yes.

Judge: Any other questions for clarification Mr. Foley?

Douglas Foley ("DF"): Well when he says he doesn't fully understand, I want to make sure

that he's not asserting or suggesting that he has a defense because he's not comprehending the document and I – maybe if the court would inquire about the statement.

Judge: Again, you have – you understand what this involves? You understand you're bound by this agreement?

RF: Yes.

Judge: And you may not understand the Rules of Evidence but you understand the contents contained in here about your obligations and your admission as to the liability?

RF: Yes

Judge: Okay. Any other clarifications that you need?

DF: No.

Judge: Okay. I'll have everyone sign off on this and then I will sign it."

CP 66 - 68.

The transcript shows that the Court carefully explained to Firebaugh that he had the opportunity not to confess judgment if he had any questions regarding the agreement. CP 66-67. Firebaugh had read the document and had adequate opportunity

to reconsider signing the Confession of Judgment if he did not understand the agreement or had the need for further consultation with his attorney. CP 66. The Court took all necessary steps to assure the proper entry of the Confession of Judgment.

(3) Terms of the Confession of Judgment.

Firebaugh entered into a Confession of Judgment which differs from a settlement agreement between the parties. The Confession of Judgment provides the monetary amount that the debtor is confessing judgment to and sets forth the factual basis for the Judgment pursuant to RCW 4.60.060. CP 17. The document states that the Firebaugh was confessing judgment for the civil claims asserted by Pietz, as shown below:

This document is for the purposes of settling and resolving all the civil claims herein and shall not be admissible for any other purpose or as an admission of liability in any other case, pursuant to the Rules of Evidence (ER) in any other proceeding, with the exception of the enforcement of any judgment herein or any attempt by Defendant to discharge any part of this judgment in bankruptcy. Defendant Firebaugh expressly reserves the right to assert any and all defenses he may have against Edward Pietz and EP

Properties in and only in the event that any criminal prosecution is commenced against him arising out of the facts of this case.

CP 20. The document does not purport to bind any other parties other than Pierz and Firebaugh and was made for the purpose of settling a civil lawsuit. *Id.*

Firebaugh, in his Declaration, alleges that he did not know that this document might be used in a criminal proceeding. CP 74-75. In the Court hearing, the Court acknowledged the fact that a prosecutor might attempt to use the Confession of Judgment in a criminal proceeding as set forth below:

**“DF: Now we do agree and stipulate that any admissions – and that’s in the document – that are made with respect to this Confession are only as to the civil case. So if he’s criminally prosecuted, he has a free hand to say well it’s only for this case.**

**Judge: Right.”** (emphasis supplied)

CP 58.

Firebaugh was in the courtroom when this exchange occurred and he was aware that there was a possibility that the Confession of Judgment could be subject to possible inquiry or use in a criminal proceeding, but that he was also entitled to use all evidentiary defenses he may have if that were to occur. CP 66-67.

(4) Trial Court History and Decision Denying the Motion to Vacate.

This case has been litigated for nearly five years, as the case was filed on October 12, 2009. CP 118. Firebaugh moved for a continuance of the trial date twice. *Id.* He engaged the services of three successive attorneys for his defense. The first attorney to appear was John J. Tollefsen. Robert Yoseph was substituted as counsel in 2010. Firebaugh's third attorney Brett Purtzer of the Hester Law Group, Inc. P.S. appeared on January 27, 2011. *Id.* Brett Purtzer filed the Motion to Vacate the Judgment and subsequent notice of appeal. The Confession of Judgment was entered on December 13, 2010. CP 17. This



case was then stayed for two years for Firebaugh's Bankruptcy proceedings.

The trial court entered its decision denying the motion to vacate the judgment on February 4, 2011. CP 131-132. This case was appealed on March 7, 2011. CP 126.

#### D. SUMMARY OF ARGUMENT

There is no basis to vacate the Confession of Judgment. Firebaugh asserts that he did not understand the agreement and there was mutual mistake. CP 74-75. He claims he did not know that the document might be used in a criminal proceeding. *Id.* The Confession of Judgment was entered into between Pietz and Firebaugh. CP 17. It does not purport to bind any other parties. The Court took all necessary steps to assure the proper entry of the Confession of Judgment. CP 66-68.

Firebaugh, a CPA, was in the courtroom and was given the choice to assent to the Confession of Judgment. *Id.* He bears the risk of signing the agreement based on his alleged

limited knowledge. Firebaugh's allegation that he suddenly realized (upon consultation with his third attorney) that the State of Washington could possibly utilize the document in a criminal proceeding is merely a ruse to delay enforcement of the Judgment. CP 66-68.

There is no mutual mistake present. Pietz was not mistaken. The confession of judgment was entered into shortly before the trial date. Whether the Confession of Judgment would actually be used in a criminal proceeding was of simply no consequence for the entry of the Confession of Judgment in this civil dispute between Pietz and Firebaugh.

There is no basis for vacation of the judgment under CR 60(b)(1). Firebaugh disagrees with the actions of his second attorney in entering into the Confession of Judgment on the eve of trial. CP 74. In *Nemaizer v. Baker*, 793 F.2d 58, 62 (2d Cir. 1986) the Court stated that "Mere dissatisfaction in hindsight with choices deliberately made by counsel [in breadth of stipulated dismissal] is not grounds for finding the mistake,

inadvertence, surprise or excusable neglect necessary to justify Rule 60(b)(1) relief.

Washington courts have long held that an attorney's negligence or incompetence does not constitute grounds for vacating a judgment under CR 60(b). This is so because under the law of agency, if an attorney is authorized to appear on behalf of a client, the attorney's acts are binding on the client. See *Haller v. Wallis*, 89 Wn.2d 539, 573 P.2d 1302 (1978); *Lane v. Brown & Haley*, 81 Wn. App. 102, 912 P.2d 1040 (1996).

Similarly, there is no basis for vacation of judgment under CR 60(b) (5) or (11). There is no void judgment – the court had jurisdiction. There was no procedural defect rendering the judgment void. CR 60(b)(11) the catchall provision is not applicable. Firebaugh cited no cases and presented no argument under either CR 60(b)(5) or (11). The use of subdivision (b)(11), authorizing relief for "any other reason justifying relief from the operation of the judgment,"

should be confined to situations involving extraordinary circumstances not covered by any other section of this rule. *Gustafson v. Gustafson*, 54 Wn. App. 66, 75, 772 P.2d 1031 (1989).

In summary, the Confession of Judgment resolved the dispute between Pietz and Firebaugh. The Confession of Judgment did not purport to bind any other parties, including the State of Washington. The trial court's decision denying the motion to vacate in favor of Pietz should be affirmed.

#### E. ARGUMENT

##### (1) Standard of Review

This court reviews the vacation of a judgment under CR 60(b) under an abuse of discretion standard. Such motions are addressed to the sound discretion of the trial court, whose judgment will not be disturbed absent a showing of a manifest abuse of discretion, *i.e.*, only when no reasonable person would take the position adopted by the trial court. *Griggs v. Averbek Realty, Inc.*, 92 Wn.2d 576, 584, 599 P.2d 1289 (1979).

(2) The Trial Court Correctly Denied The Motion To Vacate The Judgment Under CR 60(b)(1).

Firebaugh argues that the Judgment should be vacated by CR 60(b)(1), (5), and (11). No cases under CR 60(b) are cited in Firebaugh's brief. Firebaugh's arguments primarily allege that there a "mistake" in his confessing to the Judgment under CR 60(b)(1).

There was no mistake here as Firebaugh confessed judgment pursuant to RCW 4.60.010, which provides:

On the confession of the defendant, with the assent of the plaintiff or his attorney, judgment may be given against the defendant in any action before or after answer, for any amount or relief not exceeding or different from that demanded in the complaint.

RCW 4.60.060 sets forth the requirement for a concise factual statement of the facts on which the indebtedness arose, stating in pertinent part:

A statement in writing shall be made, signed by the defendant and verified by his oath, to the following effect:

(1) It shall authorize the entry of judgment for a

specified sum.

(2) If it be for money due or to become due, it shall state concisely the facts out of which the indebtedness arose, and shall show that the sum confessed to be due, is justly due or to become due.

The Confession of Judgment states that Pietz is owed \$1,552,492. CP 17. The document provides a concise statement of the facts on which the indebtedness arose. CP 18-20. Firebaugh signed under oath attesting to the statement of facts, and Pietz assented to the Confession of Judgment. CP 20-21. A Confession of Judgment differs from a settlement agreement as the debtor is voluntarily agreeing to allow Judgment to be taken against him "for any amount or relief not exceeding or different from that demanded in the complaint". See RCW 4.60.010.

There was no mistake by Firebaugh here. He unilaterally agreed to confess Judgment on the terms set forth in the document. The Confession of Judgment sets forth facts regarding the civil dispute between Pietz and Firebaugh. The

agreement does not purport to bar a non-party (State of Washington) to the agreement from seeking to admit the document into evidence or using the facts as an admission against Firebaugh in a criminal proceeding.

Firebaugh retains any evidentiary defenses he may have. Firebaugh's allegation that he suddenly realized (upon consultation with his third attorney) that the State of Washington could possibly utilize the document in a criminal proceeding is merely a ruse to delay enforcement of the Judgment.

For the issue of the admissibility in subsequent criminal proceedings the document speaks for itself, can be explained by counsel, and the admissibility of the document is subject to the future rulings of the criminal trial judge under ER 403 and other evidentiary rules. In essence, Firebaugh and his new attorney are now arguing that Firebaugh did not intend what his previous attorney Robert Yoseph wrote.

For the sake of argument, even if Firebaugh's allegations are believed and Robert Yoseph did not write what Firebaugh intended, this is not a basis for vacation of a Judgment. As a matter of law, an attorney's negligence or incompetence does not support vacation of a judgment under CR 60(b)(1). In *Nemaizer v. Baker*, 793 F.2d 58, 62 (2d Cir. 1986) the Court stated that "Mere dissatisfaction in hindsight with choices deliberately made by counsel [in breadth of stipulated dismissal] is not grounds for finding the mistake, inadvertence, surprise or excusable neglect necessary to justify Rule 60(b)(1) relief.

While CR 60(b)(1) provides a method to vacate a judgment or order based on mistake, inadvertence, surprise, excusable neglect, or irregularity, Washington courts have long held that an attorney's negligence or incompetence does not constitute grounds for vacating a judgment under CR 60(b). This is so because under the law of agency, if an attorney is authorized to appear on behalf of a client, the attorney's acts are



binding on the client. See *Haller v. Wallis*, 89 Wn.2d 539, 573 P.2d 1302 (1978); *Lane v. Brown & Haley*, 81 Wn. App. 102, 912 P.2d 1040 (1996); *M.A. Mortenson Co. v. Timberline Software Corp.*, 93 Wn. App. 819, 970 P.2d 803 (1999), *aff'd*, 140 Wn.2d 568, 998 P.2d 305 (2000), and *Rivers v. Wash. State Conference of Mason Contractors*, 145 Wn.2d 674, 679, 41 P.3d 1175 (2002).

In *Birchfield v. Harford (In re Estate of Harford)*, 86 Wn. App. 259, 265, 936 P.2d 48 (1997), the court denied relief for a client who had made a unilateral mistake of law, and found the argument that the client did not authorize its attorney to draft the agreement to be without merit, stating:

“Harford also argues that it did not authorize its attorney to draft such a settlement agreement. This argument is without merit. First, the ‘incompetence or neglect of a party's own attorney is not sufficient grounds for relief from a judgment in a civil action.’ Once a party has designated an attorney to represent him or her, the court and the other parties to an action are entitled to rely upon that authority.”

There is no mutual mistake present here. Pietz was not mistaken as to the terms of the agreement. The elements of mutual mistake are not met. In *Paopao v. Dep't of Soc. & Health Servs.*, 145 Wn. App. 40, 50, 185 P.3d 630 (2008) the court set forth the elements of mutual mistake:

A party seeking to rescind an agreement on the basis of mutual mistake must show by clear, cogent and convincing evidence that the mistake was independently made by both parties.' " *Chem. Bank v. Wash. Pub. Power Supply Sys.*, 102 Wn.2d 874, 898-99, 691 P.2d 524 (1984) (quoting *Simonson v. Fendell*, 101 Wn.2d 88, 91, 675 P.2d 1218 (1994)). Mutual mistake occurs when the belief is not in accord with the facts. Restatement (Second) of Contracts § 152 (1981). A contract is voidable for mutual mistake when

(1) Where a mistake of both parties at the time a contract was made as to a basic assumption on which the contract was made has a material effect on the agreed exchange of performances, the contract is voidable by the adversely affected party unless he bears the risk of the mistake under the rule stated in § 154.

(2) In determining whether the mistake has a material effect on the agreed exchange of performances, account is taken of any relief by way of reformation, restitution, or otherwise.

Firebaugh could have chosen to go to trial and not sign the confession of judgment. He made the choice to enter into the Confession of Judgment despite his after the fact allegations that he did not have knowledge of the terms of the agreement. In *Chem. Bank v. Wash. Public Power Supply Sys.*, 102 Wn.2d 874, 899 (1984) the court in a footnote cited the Restatement (Second) of Contracts § 154 (1981) which states that:

A party bears the risk of a mistake when

"(a) the risk is allocated to him by agreement of the parties, or

"(b) he is aware, at the time the contract is made, that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient, or

"(c) the risk is allocated to him by the court on the ground that it is reasonable in the circumstances to do so." Restatement (Second) of Contracts § 154 (1981).

Firebaugh in his brief asserts that "The Confession of Judgment sought to preclude its admissibility against Mr. Firebaugh in a criminal prosecution while preserving defenses

for Mr. Firebaugh if charged with crimes from the claims made in the civil case.” Appellants Br., Pg. 8. This statement is in error as the Confession of Judgment never purported to bind anyone other than Pietz and Firebaugh. CP 17. This Confession of Judgment was entered into to settle a civil dispute. It had no effect on any criminal proceeding.

Firebaugh, at best, and it is doubtful, was proceeding under a unilateral mistake of law. This is supported by the following passages from Appellants Brief:

Significantly, however, no evidence exists that, aside from reading this document, Mr. Firebaugh had any understanding of this document’s legal effect particularly with regard to its use in a criminal prosecution.” As set forth by Mr. Firebaugh’s declaration he had no concept or understanding of what he was doing despite what he said to the judge.

Appellant’s Br., Pg. 10.

Pietz and the Court were entitled to rely on Firebaugh’s and his attorney’s assent to the entry of the Confession of Judgment. In *Burlingame v. Consolidated Mines & Smelting*

Co., 106 Wn.2d 328, 336, 722 P.2d 67 (1986) the court found that errors of law were not correctable through CR 60(b). The Judgment should not be vacated under CR 60(b)(1) on the basis of mutual mistake.

(3) Firebaugh Is Not Entitled To Vacation of the Judgment Based Upon CR 60(b)(5) and (11).

There is no legal or factual basis for Firebaugh's argument that the Judgment is void under CR 60(b)(5). There is no question regarding service or jurisdiction here. Firebaugh did not present any arguments that detail how the judgment was void.

Similarly, there is no basis for alleging "any other reason for relief" under CR 60(b)(11). The use of subdivision (b)(11), authorizing relief for "any other reason justifying relief from the operation of the judgment," should be confined to situations involving extraordinary circumstances not covered by any other section of this rule. *Gustafson v. Gustafson*, 54 Wn. App. at 75, 772 P.2d 1031 (1989); *Lane v. Brown & Haley*, 81 Wn. App. at

107. The Court in *Lane* refused to vacate the judgment, concluding that the law favors finality and that the erroneous advice of counsel, error of counsel, surprise, or excusable neglect are not grounds to set aside a consent judgment (a settlement approved in court). *Id.* at 109.

There are no appellate cases cited by Firebaugh to support vacation of the judgment based on CR 60(b)(5) and (11), and no cases were cited in the trial court. "Errors raised for the first time on appeal need not be considered." *In re Young*, 24 Wn. App. 392, 397, 600 P.2d 1312 (1979).

Under RAP 2.5(a), the court will generally not consider arguments raised for the first time on appeal, except for (1) lack of trial court jurisdiction, (2) failure to establish facts on which relief can be granted, and (3) manifest error affecting a constitutional right. The purpose of RAP 2.5(a) is to give trial courts the opportunity to address any errors. *Salax v. Hi-Tech Erectors*, 168 Wn.2d 664, 671, 230 P.3d 583 (2010). None of the exceptions are present here.

For the foregoing reasons, the trial court was correct in denying Firebaugh's motion to vacate the judgment.

(4) Firebaugh Failed To Show A Valid Defense On the Merits.

Firebaugh did not present sufficient facts to the trial court to show that he had a valid defense to the action. RCW 4.72.050 provides that the judgment shall not be vacated "until it is adjudged that there is a valid defense to the action in which the judgment is rendered."

G. CONCLUSION

It is respectfully submitted that the trial court's order be affirmed denying the motion to vacate the judgment.

DATED this 7<sup>th</sup> day of October, 2014.

Respectfully submitted,

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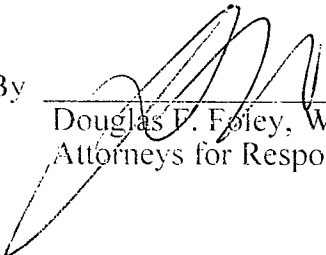
## CERTIFICATE OF SERVICE

I, Douglas F. Foley, certify that on October 7, 2014 I served or caused to be served, a copy of the foregoing Respondent's Brief, on the following counsel of record at the following address by email and by US mail.

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